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No. 99-1470

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

SAM SUBLETT; JANET NAPOLITANO, Attorney General,

Petitioners,

-vs.-

SAMUEL W. SWOOPES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728 (1999) require Arizona defendants to petition the Arizona Supreme Court for discretionary review to exhaust state remedies for federal habeas purposes when the Supreme Court of Arizona has expressly stated (1) it does not consider discretionary review petitions as an ordinary part of appellate review procedure under Arizona law, and (2) once a defendant has exercised his right to direct appeal, further review in the Arizona Supreme Court should not be sought as a matter of course?

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No. 99-1470

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BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI

Respondent, Samuel W. Swoopes, through counsel, respectfully requests that this Court deny the petition for writ of certiorari and refuse to issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeals entered in this proceeding on November 2, 1999, in Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999).

PROVISIONS INVOLVED

The Arizona Constitution, Article VI, § 5 provides, in pertinent part:

> Section 5. The Supreme Court shall have:
>
> * * * *
>
> 5. Power to make rules relative to all procedural matters in any court.

Rule 31.19 of the Arizona Rules of Criminal Procedure, Comment to 1983 amendment, provides, in pertinent part:

> The 1983 amendments to Rule 31.9 contemplate that review *will not be sought as a matter of course* (emphasis added). Review procedure is intended for those cases in which there is a tenable claim involving substantial issued of law or procedure or in which serious injustice is claimed to have occurred.

Rule 28, Arizona Rules of Appellate Procedure, provides in pertinent part:

> **(a) Opinion; Memorandum Decision; Order; Publication.**
>
> (1) An opinion is written disposition of a matter which is intended for publication under subdivision (4) below.
>
> (2) A memorandum decision is a written disposition of a matter not intended for publication.
>
> (3) An order is any disposition of a matter before the court other than by opinion or memorandum decisions.
>
> (4) Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. § 12-107, § 12-108 and § 12-120.07.
>
> * * * *
>
> (c) Disposition as Precedent. Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision must attach a copy of it to the motion or petition in which such decision is cited.

STATEMENT OF THE CASE

Mr. Swoopes was convicted of burglary, armed robbery, kidnaping and sexual assault based mostly on the identification testimony of the three victims of the crimes. On the day of the crimes, none of the victims gave a good description of their assailants and none of the victims mentioned the assailant had any facial scars. The victims, who are Caucasian, did describe their assailant(s) as being African-American, which Mr. Swoopes is. One of the victims told police in an interview hours after the robbery, "I hate to say it, but they all look the same to me for the most part and when they're sticking guns in your face, recollection just wasn't there." Furthermore, about one month after the robbery, police showed all three victims a photographic lineup containing Mr. Swoopes' picture. All three of the victims failed to identify Mr. Swoopes as the gunman.

Not until sixteen months after the crimes was Mr. Swoopes first identified as being one of the assailants. This occurred when he was in court awaiting trial on an unrelated burglary. At that time, two of the victims had come to these court proceedings after reading in a newspaper article about this unrelated burglary that had occurred on the same night and in the same neighborhood as the robbery of the victims in this case. The victims were told by police beforehand that Mr. Swoopes was a suspect in their case. Upon seeing Mr. Swoopes seated at the defense table, the two victims formed the opinion he was the assailant in their case. Mr. Swoopes was the only African-American man in the court room.

The third victim was not in court when Mr. Swoopes was first identified by the other two victims during court proceedings against Mr. Swoopes in the unrelated case. However, this third victim (a female) was married to one of the two victims who came to the opinion Mr. Swoopes was the assailant only after having seen him on trial in court and having been told he was a suspect. At

a police line-up conducted subsequently, one month after her husband identified Mr. Swoopes (which was now some seventeen months after the crime), she too decided Mr. Swoopes was the assailant. In making her identification, this victim relied on a facial scar to identify Mr. Swoopes, even though none of the victims had ever previously mentioned the existence of a facial scar.

Mr. Swoopes had counsel for his trial, his direct appeal, and his petition for post-conviction relief in the trial court. Mr. Swoopes' post-conviction relief counsel petitioned the Arizona Court of Appeals for review of the trial court's decision, but refused to file a petition for review by the Supreme Court of Arizona for discretionary review.

Mr. Swoopes proceeded pro se in federal district court. After the district court denied relief, Mr. Swoopes file a pro se opening brief with the Ninth Circuit Court of Appeals. After the State of Arizona filed its answering brief, the Ninth Circuit Court of Appeals ordered counsel be appointed for Mr. Swoopes and set a new briefing schedule. The Federal Public Defender's Office, through undersigned counsel, represented Mr. Swoopes in the Ninth Circuit, then before this Court on a petition for writ of certiorari when the Ninth Circuit affirmed Mr. Swoopes' conviction, and again before the Ninth Circuit when this Court remanded for consideration of its decision in O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728 (1999).

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF THE ARGUMENT

This Court should deny the petition for writ of certiorari because the Petitioners are merely asking this Court to micro-manage the implementation of the Court's decision in O'Sullivan v. Boerckel, 526 U.S. 838, 199 S. Ct. 1728, 1733 (1999). However, the underlying opinion of the Ninth Circuit in this case correctly states the rule this Court announced in O'Sullivan v. Boerckel and then correctly follows that rule by analyzing whether, under Arizona law, a petition for review to the state supreme court is an available part of Arizona's ordinary appellate review procedure.

A review of other recent cases from the Ninth Circuit shows that court knows and applies this Court's rule. See e.g. Gatlin v. M.K. Madding, 189 F.3d 882, 887-88 (9th Cir. 1999). In the Gatlin case, the Ninth Circuit concluded that California law required presentation of a discretionary review petition to the California Supreme Court because it was part of "California's 'established, normal [two-tiered] appellate review procedure . . . ." Id. at 888 (quoting O'Sullivan v. Boerckel, 526 U.S. at –, 119 S.Ct. at 1732-33). In Mr. Swoopes' case on the other hand, the Ninth Circuit found that Arizona law did not require presentation of a discretionary review petition to the Arizona's Supreme Court. The Ninth Circuit's ruling in Mr. Swoopes' case is based upon its familiarity with and analysis of fifteen years of Arizona case law in numerous cases before the Ninth Circuit.

As the State of Arizona itself recognizes, this Court "'generally accord[s] great deference to the interpretation and application of state law by the courts of appeals.'" State of Arizona's Respondents-Appellees' Supplemental Brief on Remand From the United States Supreme Court, p.8 (quoting McMillan v. Monroe County, Alabama, – U.S. –, 117 S. Ct. 1734, 1737 (1997)(further quotation omitted)(attached in *Appendix A*). Particularly in this case, the interpretation of Arizona

law by the Ninth Circuit Court of Appeals should be followed, because that court has a long history of dealing with the very point of law at issue in this case. The Ninth Circuit has delved into this issue and rendered opinions on this point of law for almost a decade, beginning with Jennison v. Goldsmith, 940 F.2d 1308 (9th Cir. 1991), and continuing through Binford v. Rhode, 116 F.3d 396 (9th Cir. 1997), aff'd in part, vacated in part sub nom., Ameen v. Rhode, 176 F.3d 481 (9th Cir. 1999)(Table).

In turn, the Ninth Circuit's decision is based upon fifteen years of Arizona law that unequivocally establishes the validity of the Ninth Circuit's conclusion. Based upon the Arizona Supreme Court's comments underlying the rule and its case law between 1983 and 1998, there is no doubt Arizona considers discretionary petitions for review to the state supreme court as ***not*** being an ordinary part of Arizona's appellate review process. The Arizona Supreme Court has specifically advised counsel and defendants not to bring such reviews to the supreme court as a matter of course, but to do so only under the extraordinary circumstances set forth in its rules – where there is a substantial issue of law concerning matters of importance to the State of Arizona. The Arizona Supreme Court has been aware of the Ninth Circuit's interpretation of Arizona's rule on this issue since the 1991 decision in Jennison, but in all these years the Arizona Supreme Court has never repudiated that interpretation and has never taken action to change its rule.

Petitioners have not been able to cite any Arizona precedent to the contrary of the Ninth Circuit's interpretation, nor could Petitioners, because there is none. The one case Petitioners have presented to this Court concerns an unpublished order, by a single judge, which Petitioners' counsel knows full well to have ***no precedential value***. Petition for Writ of Certiorari, p.5 & Appendix D (citing and providing State v. Stephens, Arizona Court of Appeals No. 1 CA-CV 97-0458-PR,

Order, dated August 2, 1999). Indeed, Petitioners' counsel has concealed from this Court that he was counsel of record in that case, that he requested the Arizona Court of Appeals to publish that order, that the court of appeals denied that request for publication, and that Arizona law (Rule 28(c), Ariz.R.Civ.App.) thus provides the order has no precedential value. (Order, dated Aug.2, 1999, p.3 (showing Eric J. Olsson as counsel); Motion for Publication, dated Aug.4, 1999, by Eric J. Olsson); Order, dated Feb.14, 2000 (denying motion for publication)(attached in *Appendices B.1, B2, B.3.*). Citing authority that has no precedential value has been labeled by the Arizona courts as being "of questionable propriety." State ex rel. Arizona Dep't of Revenue v. Havasue Dunes Timeshare Ass'n, 958 P.2d 447, 452 n.1 (Ariz.App. 1998)(court says party's "use" in its legal analysis of "an unpublished decision without precedential value" is "of questionable propriety").

In short, the underlying Ninth Circuit decision in this case appropriately follows the analysis and rule set forth by this Court in O'Sullivan v. Boerckel. In doing so, the Ninth Circuit concluded that presentation of discretionary petitions for review to the Arizona Supreme Court is not part of the ordinary appellate review process in Arizona and, thus, is not necessary in order for Arizona defendants to exhaust state remedies for purposes of federal habeas corpus petitions. This Court should not engage in micro-management of every court of appeals decision concerning each of the fifty states' appellate review processes where, as here, the court of appeals correctly states and follows the rule and then arrives at a particular conclusion based upon unequivocal state law. The Court should deny the petition for writ of certiorari because Petitioners have presented no grounds warranting review. See Rule 10, Rules of the United States Supreme Court ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule.")

ARGUMENT

A. THE ARIZONA SUPREME COURT HAS EXPRESSLY AND REPEATEDLY STATED THAT ARIZONA'S DISCRETIONARY REVIEW PROCEDURE IS OUTSIDE OF THE ORDINARY APPELLATE REVIEW PROCESS AND HAS DIRECTED THAT SUCH REVIEW TO THE ARIZONA SUPREME COURT SHOULD NOT BE SOUGHT AS A MATTER OF COURSE.

In O'Sullivan v. Boerckel, 526 U.S. 838, 199 S. Ct. 1728 (1999), this Court "announce[d]" a rule "requiring state prisoners to file petitions for discretionary review [in their state Supreme Court] when that review is part of the ordinary appellate review procedure in the State." Id. at 1733. O'Sullivan requires a state prisoner to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id. at 1732.

In Swoopes v. Sublett, 196 F. 3d 1008 (9th Cir. 1999), the Ninth Circuit followed the rule this Court announced in O'Sullivan, noting "the Supreme Court held that, in order to satisfy the exhaustion requirement for federal habeas relief, state prisoners must file for discretionary review in a state supreme court when that review is part of ordinary appellate review." Id. at 1009. Examining fifteen years of Arizona case law, the Ninth Circuit concluded that post-conviction petition for review to the Arizona Supreme Court is a remedy which is "unavailable" within the meaning of O'Sullivan. As the Ninth Circuit found, Arizona has declared that a "complete round" of its ordinary appellate review process does not include discretionary review before the Arizona Supreme Court. Id. at 1010. This reasoning and holding of the Ninth Circuit's Swoopes decision has been misconstrued by Petitioners in their petition for writ of certiorari. The Ninth Circuit decision is correct.

1. Arizona and Illinois have different appellate review procedures.

Petitioners allege the Ninth Circuit is wrong because of their view that no meaningful distinctions exist between the two-tiered appellate procedures of Illinois (the appellate procedures involved in O'Sullivan) and of Arizona. Petition for Writ of Certiorari at 6. A cursory review of both appellate procedures might lead one to such conclusion. But closer analysis of the discretionary rules of procedure and interpretive case law reveals two crucial distinctions between the rules and case law of Illinois and Arizona. A review of the rules and case law establish that, in Illinois, discretionary leave to *appeal* to the Illinois Supreme Court is part of a defendant's right to appeal, and so is an ordinary appellate procedure. In Arizona, however, a petition for review in the Arizona Supreme Court is separate from (not part of) a defendant's right to appeal and, thus, is outside of the ordinary appellate review procedure.

First, Rule 315 of the Illinois Supreme Court Rules is titled "Leave to Appeal From the Appellate Court to the Supreme Court." The Rule states in pertinent part, ". . . a petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right." Illinois considers this *petition for leave to appeal* as part of an Illinois defendant's right to a criminal appeal, and a necessary one at that. See e.g. People v. Quigley, 697 N.E.2d 735, 741 (Ill. 1998)(calling review before the Illinois Supreme Court on such a petition for leave an "appeal" and "consider[ing] the scope of review on appeal"); People v. Williams, 282 N.E.2d 503, 505 (Ill.App. 1972)(a defendant waives his right to bring an issue in post-conviction proceedings if he fails to raise that issue in the trial court, on direct appeal, or in a petition for leave to appeal to Illinois Supreme Court); United States ex rel. Burks v. Washington, 1995 WL 642822 *5 (D.Ill. 1995), aff'd, Burks v. Nelson, 103

F.3d 133 (7th Cir. 1996)(Table)(noting defendant was required under Illinois law to petition for leave to appeal to the Illinois Supreme Court). To Respondent's knowledge, Illinois has never held that a petition for discretionary review is not an appeal or that it is unnecessary for preservation of issues for further review.

Rule 31.19 of the Arizona Rules of Criminal procedure is titled "Petition for Review." This is in direct contrast to Illinois's title of "Leave to Appeal From the Appellate Court to the Supreme Court." As the different names of these titles indicate, there is a significant, substantive distinction between the rules of Arizona and those of Illinois. In Arizona, a petition for review to the Arizona Supreme Court is ***not*** a part of an Arizona defendant's right to direct appeal to the Court of Appeals under the Arizona Constitution and Arizona statutory law. ARIZ. CONST., Art. 2, § 24; A.R.S. §§ 12-120.21 (A)(1);12-120.24; 13-4031. See also Rule 31, Ariz.R.Crim.P. The right to direct appeal to the Arizona Court of Appeals is the only ordinary appellate review procedure that Arizona defendants have available. The Arizona Supreme Court has expressly indicated petitions for review are discretionary and not an appeal within the meaning of the right to appeal under Rule 31. Moreno v. Gonzales, 926 P.2d 205, 207 (Ariz. 1998). The Arizona Supreme Court has also directed that [o]nce a defendant has exercised his right to direct appeal, further review in this court ***should "not be sought as a matter of course***." Id. at 208 (emphasis added). The Arizona Supreme Court further noted "we would not have encouraged discretionary filings, by including a petition for review within Rule 32.1(f)." Id.[1]

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[1] The Arizona Supreme Court, answering a question certified by the Ninth Circuit in Binford v. Rhode, 116 F.3d at 400, held that a petition for review to the Arizona Court of Appeals from denial of a post conviction petition in the trial court is not an "appeal" within the meaning of Rule 32.1(f), Ariz.R.Crim.P. Rule 32.1(f) states post conviction relief is available where failure to appeal from the judgment, sentence, or both within the prescribed time was without fault of defendant.

Second, the case law concerning these procedures is similarly contrasting. In Arizona, the state supreme court has consistently and clearly maintained for fifteen years, from the inception of the 1983 amendment to the rule and continuing through a recent 1998 opinion, that an Arizona defendant exhausts his state remedies by appealing his case to the Arizona court of appeals and that he need not, and should not, seek review in the state supreme court because that is not part of the ordinary appellate review procedure. See Argument **A.2**, infra. In sharp contrast, however, there is "no such Illinois Supreme Court decision" that indicates an Illinois defendant need not seek review via a petition for leave to appeal to the state supreme court. United States ex rel. Burks v. Washington, 1995 WL 642822 *5. In fact, the Illinois federal district court in Washington specifically compared the "clear and unambiguous" statements of the Arizona Supreme Court in Shattuck and Sandon, as discussed by the Ninth Circuit in United State v. Harmon, to the opposite situation in Illinois, and found no similar decision or decisions. Id. at *4-*5. Moreover, as noted above, other Illinois decisions indicate an Illinois defendant commits procedural default for state purposes if he fails to seek such review from the state supreme court. See e.g. People v. Williams, 282 N.E.2d at 505.

In summary, Illinois considers discretionary review to its appellate courts as part of a defendant's right to appeal. Arizona, on the other hand, considers discretionary review to its appellate courts, not an appeal. This distinction, for federal habeas exhaustion purposes, makes discretionary review available as part of the ordinary appellate review process in Illinois but unavailable as part of the ordinary appellate review process in Arizona, within the context of O'Sullivan.

2. The Arizona Supreme Court has expressly held defendants in Arizona need not seek review before it to properly exhaust state remedies for federal habeas purposes.

Petitioner alleges the Ninth Circuit and this Court have misread State v. Sandon, 777 P.2d 220 (1989). The Ninth Circuit, however, did not base its decision about Arizona law only on the Sandon case, but rather upon the comments and cases of the Arizona Supreme Court over a fifteen year period, from 1983 to 1998. Petitioners ignore this substantial history in Arizona, as well as the fact that the Arizona Supreme Court has been fully aware of the Ninth Circuit interpretation of its law but has never repudiated that interpretation or taken steps to change the rule as interpreted. Moreover, Petitioners are wrong about the plain import of Sandon.

In Sandon, the Arizona Supreme Court expressly held a defendant exhausts state remedies once the Court of Appeals decides the issues presented to it, even though the defendant never subsequently presents those issues to the Arizona Supreme Court via a discretionary petition for review. It is Petitioners who misread Sandon by believing its holding concerns only successive petitions for discretionary review. Petition for Writ of Certiorari at 7-8. Petitioners err by ignoring the fact Sandon relied upon and adopted the blanket holding of State v. Shattuck, 684 P.2d 154 (Ariz. 1984), a case that dealt with a first petition for discretionary review following a direct appeal to the state court of appeals.

In Shattuck, the Arizona Supreme Court issued an express and broad holding that, except in cases carrying a life sentence or the death penalty, a decision by the court of appeals exhausts a defendant's right to appeal in Arizona. Id. at 157. The Arizona Supreme Court based its broad holding in part on the commentary to Rule 31.19 of the Arizona Rules of Criminal Procedure, which was added when the rule was amended in 1983. That commentary contemplated that discretionary

review to the state supreme court "will **not** be sought **as a matter of course**." Id. (emphasis added). As the Arizona Supreme Court later stated in Sandon:

> While Shattuck involved a discussion of the role of counsel in cases appealed according to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed. 2d 493 (1967), the ***considerations are the same when discretionary review is sought in this Court pursuant to Rule 31.19***. "Once the defendant has been given the appeal to which he has a right, state remedies have been exhausted." Shattuck, 140 Ariz. at 585, 684 P. 2d at 157. Not only is this Court not "required to accept petitions for review in Anders type of cases," id., we are not required to accept them in any case. Id. at 584, 684 P. 2d at 156.

Sandon, 777. P.2d at 221 (emphasis added).

Contrary to Petitioners' reading, Sandon does not conclude that state remedies are exhausted because a successive petition for review is involved. The words "procedural default" do not appear anywhere in the opinion. This indicates the Arizona Supreme Court did not limit its holding to successive petitions for review, as Petitioners claim. Indeed, had the state supreme court intended its statement only to apply to successive petitions as Petitioner alleges, the Court would have clearly said so. Petitioner cites no case which supports its reading of *Sandon*. All cases in the Ninth Circuit, and this Court in O'Sullivan, read Sandon as the Arizona Supreme Court's express statement that Arizona defendants are not required to (and should not) file discretionary petitions for review in the Arizona Supreme Court to complete the Arizona appellate review process and to exhaust state remedies for federal habeas purposes.[2]

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[2] This Court cited Sandon as an example of a state court which expressly stated it does not wish to have an opportunity to review constitutional claims before those claims are presented to a federal habeas court. O'Sullivan, 119 S. Ct. at 1733-34. Every Ninth Circuit case interpreting Sandon and Shattuck agrees with this reading. Swoopes v. Sublett, 196 F. 3d 1008 (9th Cir. 1999) (Sandon holds that once a defendant has been given the appeal to which he has a right, state remedies have been exhausted); Coley v. Gonzales, 55 F. 3d 1385, 1388 (9th Cir. 1995)(same); Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992)(same); Harmon v. Ryan, 959 F. 2d 1457, 1459 (9th Cir. 1992)(same); Jennison v. Goldsmith, 940 F. 2d 1308, 1309-10 (9th Cir. 1991)(same).

Petitioners also ignore the Arizona Supreme Court's recent decision in Moreno v. Gonzales, 926 P. 2d 205 (Ariz. 1998). That decision decided questions the Ninth Circuit had certified to the state supreme court in two cases, Binford v. Rhode, 116 F.3d at 39, and Moreno v. Gonzalez, 116 F.3d 409, 411 (9th Cir. 1997), concerning exhaustion issues within the meaning of Rule 32.1 (f).[3] In its decision, the Arizona Supreme Court expressly held petitions for discretionary review are not appeals. 962 P.2d at 207. The state supreme court's opinion also confirms that Shattuck and Sandon "squarely define the nature and scope of discretionary review by petition for review" in the Arizona Supreme Court. Id. The Arizona Supreme Court reaffirmed that once a defendant has exercised his right to direct appeal, discretionary review to that court should not be sought as a matter of course. Id. at 208. In other words, discretionary petitions for review in Arizona are not part of the ordinary appellate review procedure.[4]

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[3]Rule 32.1(f) provides a petition for post conviction relief is available where: "The defendant's failure to appeal from the judgement, sentence, or both within the prescribed time was without fault on the defendant's part."

[4] The Arizona Attorney General, which was also counsel for the State of Arizona in Binford and Moreno, both in the Ninth Circuit and the Arizona Supreme Court, never argued to the Arizona Supreme Court that its rule about exhaustion was being misinterpreted by the Ninth Circuit and never requested that the state supreme court straighten out this alleged error. State of Arizona's Respondents-Appellees' Answering Brief, Arizona Supreme Court No. CV-97-0268-CQ, pp.20-21, dated 11/4/97 (attached in *Appendix C*). Afterward, in supplemental briefs filed in the Ninth Circuit in the Binford case, the Arizona Attorney General conceded Binford's habeas petition was not precluded concerning the voluntariness of his plea and effectiveness of his counsel because of the Arizona Supreme Court decisions in Shattuck and Sandon. State of Arizona's Respondents-Appellees' Supplemental Answering Brief, Ninth Circuit Court of Appeals No. 96-15189, pp.5,7, dated 11/27/98 (attached in *Appendix D*). See also State of Arizona's Brief in Opposition, Swoopes v. Sublett, Supreme Court of the United States No. 98-7357, p.17 & n.4 ("Arizona prisoners were justifiably confused" by these decisions to believe they need not seek review to that court to exhaust state remedies). Attorneys for Binford, arguing the state court of appeals had actually decided those two issues, asked that the district court's order finding "no exhaustion" and "preclusion" on these two issues be reversed and vacated. Supplemental Reply Brief of Petitioner/Appellant, Ninth Circuit Court of Appeals No. 96-15189, pp.1-9,22-23, dated 12/28/98 (attached in *Appendix E*). The Ninth

This trilogy of Shattuck, Sandon, and Moreno make it abundantly clear that in Arizona, petitions for discretionary review in the Arizona Supreme Court are not "a matter of course" but rather are extraordinary, that is, outside the ordinary appellate review procedure. Additionally, these cases also express the Arizona Supreme Court's clear statement that it does not want the opportunity to review constitutional issues once the Arizona Court of Appeals has ruled on them because of its view the Arizona appellate review procedure is complete at that time. The Arizona Supreme Court has maintained this position consistently since 1983, when the rule was enacted, and has never disavowed that rule or repudiated the Ninth Circuit's interpretation of that rule.

Petitioners are unable to provide any contrary authority. Instead, Petitioners improperly cite an unpublished order from the Arizona Court of Appeals as support for its proposition that this Court and the Ninth Circuit have mischaracterized Arizona law. Petition for Writ of Certiorari at 5 (citing August 2, 1999 order in State v. Stephens, attached in Petitioners' Appendix D). This Court should ignore this unpublished order and strike its reference from the brief and the copy of it from the appendix.

Petitioners engage in conduct of "questionable propriety" in citing that unpublished order to the Court, not only because Petitioners know Arizona regards the order as having ***no precedential value***, but also because Petitioners conceal from this Court that their counsel was attorney of record in that case, that their counsel sought to have the order published so it could be cited as precedent, and that the Arizona Court of Appeals denied the request to publish the order. State ex rel. Arizona Dep't of Revenue v. Havasue Dunes Timeshare Ass'n, 958 P.2d 447, 452 n.1 (Ariz.App. 1998)

Circuit subsequently reversed and vacated the district court's decision in part, in an unpublished opinion. Ameen v. Rhode, 176 F.3d 481 (9th Cir. 1999)(Table).

(party's "use" of " unpublished decision without precedential value" is "of questionable propriety"); *Appendices B.1 - B.3* (Order, dated Aug.2, 1999, p.3, showing Eric J. Olsson as counsel; Motion for Publication, dated Aug.4, 1999, by Eric J. Olsson; Order, dated Feb.14, 2000, denying motion).

Arizona clearly regards an unpublished order as something that has no precedential value. Rule 28 of the Arizona Rules of Civil Appellate Procedure establishes orders as having lesser significance than written opinions, noting that such orders are a "disposition of a matter before the court other than by opinion or memorandum decision." Rule 28(a)(3). The rule further establishes that even unpublished memorandum decisions (which are issued by ***three*** judge panels) "shall not be regarded as precedent nor cited in any court" except for limited purposes not at issue here. Rule 28(c). Had the Arizona appellate court wished unpublished orders (particularly those by a single judge) to be cited for any reason, it would have included them in Rule 28(c). Instead, the rule does not expressly allow citation of unpublished orders for any purpose. The rule is clarified by Arizona case law, which holds that publication of a court decision or order is the key to whether the decision or order has any precedential value and may be cited as authority of the courts. See Francis v. Arizona Dep't of Transportation, MVD, 963 P.2d 1092, 1094 (Ariz. App. 1998)(a decision of the appellate court becomes "binding precedent when it [is] published"); State v. Smith, 818 P.2d 228, 231 (Ariz.App. 1991)("unpublished memorandum decision" of appellate court "has no precedential value"); State v. Poli, 776 P.2d 1077, 1078 (Ariz.App. 1989)(the appellate court issues published opinions, which have precedential value, when necessary "for the benefit of the bench, the bar, and the public;" otherwise, the court will issue unpublished orders); Barry v. Arizona Dep't of Economic Security, 542 P.2d 1138 (Ariz.App. 1984)(the court issues a "published opinion," as opposed to "an unpublished order," when necessary "to declare the proper rule and avoid confusion"). Therefore,

Petitioners' improper citation to this Court of an unpublished order by a single judge, which Petitioners know has no precedential value, should be resoundingly rejected in consideration of the petition for writ of certiorari.[5]

The Arizona Supreme Court is undoubtedly aware of the Ninth Circuit's Swoopes decision. If Swoopes is incorrectly decided and the Arizona Supreme Court consider petitions for discretionary review as part of the ordinary appellate review process, it can correct the Ninth Circuit error by court rule, order, or opinion. Under its rule making authority, the Arizona Supreme Court can change procedure in any Arizona Court. ARIZ.CONST. art. VI, § 5 (The Supreme Court shall have . . . [p]ower to make rules relative to all procedural matters in any court); A.R.S. § 12-109(A); State ex rel. Napolitano v. Brown, 982 P.2d 815, 817 (Ariz. 1999)("constitutionally vested, exclusive rulemaking authority" resides with the Arizona Supreme Court); Slayton v. Shumway, 800 P.2d 590, 592 (Ariz. 1990)(such rulemaking authority is "broad" and exists "in all cases, criminal and civil"). However, as noted above, the Arizona Supreme Court has been aware of the Ninth Circuit's interpretation of the Arizona appellate review process since at least 1991 (the Jennison and Harmon cases) but has taken no action to disavow that interpretation or to change the rule, and instead has

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[5] This unpublished court of appeals order is unreliable as an indicator of Arizona law, not just because it was issued by a single judge, nor because the judge refused to publish it as precedent, nor even because the order appears to have been issued without briefing by a party opponent (the defendant in the Stephens case), but also because it lacks analysis, such as that conducted by the Ninth Circuit in Swoopes, of Arizona case law. As earlier stated, the trilogy of Shattuck, Sandon, and Moreno, expressly place petitions for discretionary review outside the standard appellate review process in Arizona. Moreover, the unpublished order seems to be based upon a misperception that the Ninth Circuit, in its 1991 Jennison case, nullified Arizona's procedural rule and that Arizona would thus have to take some action subsequent to this Court's O'Sullivan decision in order to reverse Jennison.

reaffirmed that interpretation in its own recent opinion in Moreno v. Gonzales. The Arizona Supreme Court remains silent because Swoopes is correctly decided, as was Harmon.

In conclusion, the Ninth Circuit Court of Appeals understands and correctly applied the rule this Court announced in O'Sullivan v. Boerckel. In the instant Swoopes case, the Ninth Circuit concluded that discretionary review to Arizona's state supreme court is not necessary to exhaust state remedies for federal habeas purposes because of its finding that such review is not part of Arizona's ordinary appellate review process. In Gatlin v. Madding, the Ninth Circuit concluded otherwise with respect to California's discretionary review to that state's supreme court, because of its finding that such review is part of California's ordinary appellate review process. The Ninth Circuit, and all other circuit courts of appeal, will continue to decide this question for each of the remaining states. Pursuant to this Court's rules and practice, however, this Court will not grant petitions for writ of certiorari to undertake review of each circuit court of appeals decision of each of the fifty states appellate review procedures, particularly because -- as Petitioners agree -- those courts "'generally [are] accord[ed] great deference to the interpretation and application of state law by the courts of appeals.'" State of Arizona's Respondents-Appellees' Supplemental Brief on Remand From the United States Supreme Court, p.8 (quoting McMillian v. Monroe County, Alabama, - U.S. -, 117 S. Ct. 1734, 1737 (1997)(attached in *Appendix A*). Accord South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 511 (1986)("the Court of Appeals is in a better position to evaluate such an issue of state law than we are"); Bishop v. Wood, 426 U.S. 341, 346 n.10 (1976)(reviewing Supreme Court practice to defer to and uphold judgments of courts of appeal on issues of state law unless their conclusions are "unreasonable"). This Court leaves implementation and application of its decisions to the federal district and circuit courts. Rule 10, Rules of the Supreme Court.

3. Swoopes is correctly decided and comity mandates Arizona should be allowed to administer its discretionary appellate review system free from federal interference.

This Court has noted comity interests drive the exhaustion rule. O'Sullivan, 119 S. Ct. at 1733. The Arizona Supreme Court has expressly held state remedies are exhausted, that is outside the ordinary review procedure and unavailable under O'Sullivan, once a defendant's exercises his right to direct appeal. This Court should not, and has stated it will not, "ignore a state law" which expressly provides that discretionary review, whether in Arizona's Supreme Court or Court of Appeals, is not available and not part of the ordinary appellate review procedure. Id. at 1734. To ignore Arizona's clear statement of its rules and its wishes that Arizona defendants not seek review in the state supreme court is to disserve comity.

Swoopes is correctly decided. Nevertheless, Petitioners speculate Swoopes will deprive the Arizona Supreme Court of its jurisdiction in innumerable cases, dramatically increase the number of claims that federal habeas courts must address on the merits, offend comity and retroactively apply to all cases since Sandon was published in 1989. Petition for Writ of Certiorari at 8. None of these assertions is supported by facts or law.

As noted in O'Sullivan, since 1990 South Carolina has made it plain that a defendant need not seek discretionary review in the Supreme Court after an adverse decision in the state court of appeals in order to exhaust state remedies. O'Sullivan, 119 S.Ct. at 1733-1735. South Carolina has not changed this rule and its supreme court is doing what it is supposed to be doing - accepting review only on issues of broad significance for South Carolina. "Claims of violations of well-established constitutional rules, important as they may be to individual litigants, do not ordinarily present such issues." Id. at 1739. Moreover, pro se defendants and attorneys who have issues of

broad significance for Arizona will still present those claims for discretionary review. A discretionary petition cannot hurt and will only potentially help their litigation. Petitioners' contrary argument, that the Arizona Supreme Court will somehow lose its jurisdictional base and ability to control Arizona law is perplexing and unfounded. Not only will defendants continue to bring issues to the state supreme court if those issues might possibly result in review (i.e., an "important" or "substantial" issue of state law in which a "serious injustice" has occurred, Rule 31.19 & 1983 Comment, Ariz.R.Crim.P.), but so will the State of Arizona whenever it feels a decision of the court of appeals is in error. It is through these encouraged petitions that the Arizona Supreme Court (as does the South Carolina Supreme Court) obtains jurisdiction in issues of broad state significance. Therefore, the Arizona Supreme Court will still continue to control Arizona law as it always had done, including through publication of its own opinions or depublication of court of appeals opinions.

Petitioner's claim that, because of Swoopes federal courts will have to decide many more claims on the merits, does not speak to comity but rather to Petitioner's convenience. Pro se defendants, because of Swoopes, have a simple exhaustion rule which benefits not only Arizona courts, but also unsophisticated pro se defendants who will not be the latest victim of complicated procedural default rules. This case illustrates the point. Mr. Swoopes had no counsel during his litigation in federal district court. He sailed the complex sea of procedural default alone. The Ninth Circuit appointed counsel on appeal after the State of Arizona and Mr. Swoopes filed their opening briefs. Procedural default has been raised by Petitioner at every step of the litigation. The district court reached the merits of only one of six claims. Federal courts have the duty to decide federal

constitutional claims so long as they are first presented to the state courts. Swoopes only requires federal courts to exercise their duty in these cases as required by 28 U.S.C. § 2254.

Petitioners also allege Swoopes will be retroactively applied to all cases since Sandon was decided in 1989, thereby inundating the Ninth Circuit with "thousands of § 2254 habeas cases." Petition for Writ of Certiorari at 3, 8. First, the issue of retroactivity is not relevant to the question of whether Swoopes was correctly decided by the Ninth Circuit or to whether the petition for writ of certiorari should be granted. Indeed, the question of retroactivity is not presented to the Supreme Court in Petitioners' petition and its resolution must await another day. Second, Petitioners present no analysis to support their assertion and, in fact, Petitioners know and have already argued in the Arizona case cited to this Court that the O'Sullivan rule could only be applied prospectively, to future cases or possibly pending cases that are not yet final. See Motion for Reconsideration, p.3, dated July 9, 1999, State v. Stephens, Arizona Court of Appeals No. 1 CA-CR 97-0458-PR (Petitioners' counsel stating that "[t]he rule [announced in O'Sullivan v. Boerckel] ***applies to all prospective § 2254 habeas litigants . . . .***")(emphasis added)(attached in *Appendix B.4*). Moreover, as a practical matter, in a great many if not most of those cases no litigation would likely be possible because they have been fully concluded and sentences fully served.

Petitioners additionally claim that Swoopes somehow offends comity because it will decrease the number of discretionary review petitions filed in the Arizona Supreme Court. Petition for Writ of Certiorari at 4, 6, 8. Petitioners' argument is based upon its clearly mistaken view that the Arizona Supreme Court has "never ... discouraged or prohibited timely petitions for discretionary review of meritorious claims." Id. at 4 (calling a contrary belief "imagined"). However, as already discussed above, the Arizona Supreme Court has unequivocally stated since the 1983 amendment

to the discretionary review rule that such review should "not be sought as a matter of course." Rule 31.19, Ariz.R.Crim.P., Comment [to 1983 amendment]; Moreno v. Gonzalez, 962 P.2d at 208 (Arizona Supreme Court reiterating in 1998 that "[o]nce a defendant has exercised his right to direct appeal, further review in this court should 'not be sought as a matter of course'" and, further, that it "would not have encouraged discretionary filings") (citing the 1983 Comment). Without doubt, the Arizona Supreme Court has not only "discouraged" discretionary review (except for issues of "substantial issues" of state wide importance that involve "serious injustice, Rule 31.19, Comment), but it has repeatedly and explicitly stated that such review is not part of the ordinary appellate review procedure in criminal cases. Therefore, contrary to Petitioners' claims, Swoopes serves comity because it is entirely consistent with the clear statements and desires of the Arizona Supreme Court.

Finally, Petitioners mistakenly claim that the Swoopes decision will cause "chaotic parallel state and federal litigation," because the decision will permit defendants to proceed to federal court on habeas petitions while at the same time seeking discretionary review in the Arizona Supreme Court. Petition for Writ of Certiorari at 9. Petitioners' assertions are wrong because simultaneous litigation in federal district court on habeas petitions and in other courts (whether state or even the Supreme Court) already is something that occurs and is easily dealt with by the courts. See JAMES S. LIEBMAN & RANDY HERTZ, Federal Habeas Corpus Practice and Procedure, §§ 5.1a, 5.2, 5.3, pp. 216-17, 249-51, 251-52 (3rd Ed. 1998). Simultaneous litigation already can and does occur because of the strict time limitations and tolling rules of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), or because of the need to seek relief in the federal courts during pretrial criminal proceedings in state courts (e.g., for illegal custody or untimely hearing issues) or in death penalty case where immediate relief is necessary to avoid irreparable harm. Id. Any potential "trouble" that

might arise from such simultaneous litigation is easily remedied by the federal court either abstaining from deciding the case under Younger v. Harris, 401 U.S. 37 (1971), or granting a stay of or deferring adjudication (i.e., holding it in abeyance) of the habeas proceedings until the proceedings in the other court are concluded. LIEBMAN at pp.216, 251 & n.10, 252. The potential trouble Petitioners assert from the Swoopes decision is even more easily averted, because a defendant has only 30 days under Rule 31.19(a), Ariz.R.Crim.P., from the decision of the court of appeals to file a petition seeking discretionary review. By the time a defendant brings a habeas petition in federal court, Petitioners will know if defendant has such review pending or decided and will alert the district court and seek a stay or deferral. Therefore, contrary to Petitioners' claims, the Swoopes decision clearly will cause no troublesome simultaneous, wasteful, or conflicting litigation.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

RESPECTFULLY SUBMITTED: April 5, 2000

FREDRIC F. KAY
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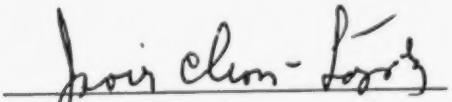
District of Arizona



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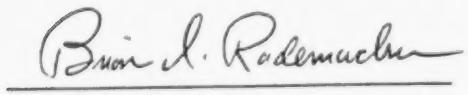

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16033

SAMUEL W. SWOOPES,

PETITIONER-APPELLANT,

-vs-

TERRY L. STEWART, et al.,

RESPONDENTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-93-00471-JMR

RESPONDENTS-APPELLEES' SUPPLEMENTAL BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT

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II

BECAUSE PETITIONS FOR DISCRETIONARY ARIZONA SUPREME COURT REVIEW OF THE ARIZONA COURT OF APPEALS' DISPOSITION OF CRIMINAL APPEALS AND OF PETITIONS FOR POST-CONVICTION RELIEF ARE "PART OF THE ORDINARY APPELLATE REVIEW PROCEDURE IN THE STATE," THIS COURT MUST MAKE CLEAR THAT ARIZONA STATE PRISONERS WHO WISH TO EXHAUST CLAIMS PRESENTED TO THE ARIZONA COURT OF APPEALS MUST SEEK DISCRETIONARY REVIEW BY THE ARIZONA SUPREME COURT BEFORE RAISING THOSE CLAIMS IN A PETITION FOR WRIT OF FEDERAL HABEAS CORPUS.. 7

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STATEMENT OF JURISDICTION

These proceedings derive from a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. Swoopes remains imprisoned within the Arizona Department of Corrections system.

QUESTIONS PRESENTED FOR REVIEW

1. Were petitions for discretionary Arizona Supreme Court review of the Arizona Court of Appeals' disposition of criminal appeals and of petitions for post-conviction relief "part of the ordinary appellate review procedure in the state" in the years 1986 through 1991, i.e., was the procedure available during that time to Samuel Swoopes the same as to "any party" as provided by Rule 31.19, Arizona Rules of Criminal Procedure?

2. Are petitions for discretionary Arizona Supreme Court review of the Arizona Court of Appeals' disposition of criminal appeals and of petitions for post-conviction relief "part of the ordinary appellate review procedure in the state" today, and must Arizona state prisoners who wish to exhaust claims presented to the Arizona Court of Appeals seek discretionary review by the Arizona Supreme Court before raising those claims in a petition for writ of federal habeas corpus?

STATEMENT OF THE CASE

The facts and procedural history of this case are summarized in *State v. Swoopes*, 155 Ariz. 432, 432–33, 747 P.2d 593, 593–94 (App. 1987), and in the district court's order and memorandum opinion (CR 11), and they are set forth in detail in Respondents' second Answering Brief, dated December 15, 1997. There appears to be no need to repeat them here.

On appeal, this Court affirmed the district court's denial of habeas relief, holding all but one of Swoopes' claims precluded due to unexcused procedural defaults. *Swoopes v. Sublett*, No. 94–16033 at 2–3 (mem. decision, May 8, 1998). From that judgment Swoopes sought a writ of certiorari in the United States Supreme Court. The Supreme Court vacated this Court's memorandum opinion and remanded the matter for reconsideration in light of *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999). This Court in turn ordered supplemental briefing on what should be the appropriate disposition of Swoopes' case in light of *Boerckel*. (Order, filed June 22, 1999.)

SUMMARY OF ARGUMENTS

O'Sullivan v. Boerckel changes nothing in Swoopes' case. It merely reiterates the rule announced by this Court almost a decade ago in *Jennison v. Goldsmith*, 940 F2d 1308, 1310–11 and n.4 (9th Cir. 1991), that to exhaust state remedies for purposes of federal habeas corpus, state prisoners must seek discretionary review by the state's highest court if that remedy is available and a part of ordinary appellate procedure. Thus, because that common remedy was available to

Swoopes, he procedurally defaulted all claims for which he failed to seek that remedy. This Court reached the correct result before in Swoopes' case, and *Boerckel* does not change that outcome.

However, because erroneous dictum in *Boerckel* about Arizona law portends massive confusion for courts and litigants alike, this Court must make absolutely clear to Arizona state prisoners that, despite any suggestion to the contrary in *Boerckel*, they must petition for discretionary review in the Arizona Supreme Court in order to exhaust claims that were presented to the Arizona Court of Appeals, and that they must include in the petition for review all such claims that they wish to preserve for federal habeas review.

ARGUMENTS

I

PETITIONS FOR DISCRETIONARY ARIZONA SUPREME COURT REVIEW OF THE ARIZONA COURT OF APPEALS' DISPOSITION OF CRIMINAL APPEALS AND OF PETITIONS FOR POST-CONVICTION RELIEF WERE "PART OF THE ORDINARY APPELLATE REVIEW PROCEDURE IN THE STATE" IN THE YEARS 1986 THROUGH 1991, AND THE PROCEDURE WAS AVAILABLE DURING THAT TIME TO SAMUEL SWOOPES, THE SAME AS TO "ANY PARTY" AS PROVIDED BY RULE 31.19, ARIZONA RULES OF CRIMINAL PROCEDURE; THEREFORE, SWOOPES PROCEDURALLY DEFAULTED ALL CLAIMS FOR WHICH HE DID NOT TIMELY SEEK THAT REMEDY.

O'Sullivan v. Boerckel, 119 S. Ct. 1728 (1999), announced the following rule: to exhaust state remedies for federal habeas purposes, "state prisoners [must] file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." 119 S. Ct. at 1733. The remedy of discretionary review was available in 1987, and Swoopes timely sought such review of his direct appeal but failed to include all his claims in the petition for review. Discretionary review also was available in 1991, but Swoopes failed to file a timely petition for Arizona Supreme Court review of the Court of Appeals' affirmance of the denial of his petition for post-conviction relief—even after the Court of Appeals granted him an extension of the filing deadline.[1] Therefore, under the rule announced in *Boerckel*, Swoopes defaulted all but one of his habeas

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1. The procedural history of Swoopes' claims is described in detail in Respondents' second Answering Brief, dated December 15, 1997, at pages 7–12.

claims by failing to seek the available state-court remedy of discretionary review. *See Jennison v. Goldsmith*, 940 F2d 1308, 1310–11 and n.4 (9th Cir. 1991) ("Although review under Rule 31.19 is discretionary, it is nevertheless a state remedy that remains available"). This Court correctly held those claims precluded.

Dictum in the *Boerckel* opinion, however, erroneously cites *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989), as an example of a state court that "do[es] not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." 119 S. Ct. at 1734. According to that dictum, *Sandon* means that petitions for discretionary review by the Arizona Supreme Court are "unwelcome," at minimum, or that the remedy might even be "unavailable," if the Arizona Supreme Court has declared it so. *Id*. Apparently, that misperception of the meaning of *Sandon* is what motivated the United States Supreme Court to order reconsideration in Swoopes' case.

Boerckel's reference to *Sandon* is merely dictum because the *Boerckel* decision turned on Illinois procedural law, not Arizona law, and *Boerckel* held only, as this Court did in *Jennison*, that state prisoners must seek discretionary review if it is available as part of ordinary appellate procedures. 119 S. Ct. at 1734. While speculating that discretionary review might be unavailable or at least "discouraged" in Arizona, the *Boerckel* Court did not actually decide that question —properly so, because the court had received no briefing from any source knowledgeable about Arizona's procedures. Thus, not having decided the issue

of availability in Arizona, *Boerckel* at most merely requires this Court to make a determination of the availability of the remedy with respect to Swoopes.

Boerckel's broad rule, that discretionary review must be exhausted if available, supports this Court's previous findings of procedural preclusion because it merely reiterates what this Court held in 1991 with respect to Arizona's procedures—that federal law dictates federal exhaustion requirements, and that state prisoners must exhaust all available state remedies with respect to each claim, including discretionary review, if discretionary review is available. *Jennison*, 940 F.2d at 1310–11 and n.4; *Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992).

Boerckel's dictum, on the other hand, is utterly wrong about Arizona law. In Arizona, discretionary review of a decision by the Court of Appeals in a criminal case is available to "any party," under Rule 31.19, Arizona Rules of Criminal Procedure (promulgated by the Arizona Supreme Court), and it was available to "any party" in 1987 and 1991, under the same rule, when Swoopes defaulted his claims. The statistics reported by the Arizona Supreme Court make clear that petitions for discretionary review are very much a part of ordinary appellate procedure in Arizona—many hundreds of petitions are filed and processed each year. See n.3, *infra*, and accompanying text. "Any party" may timely file a petition for review by the Arizona Supreme Court. Rule 31.19(a), Ariz. R. Crim. P. That is how the Arizona Supreme Court obtains jurisdiction over all non-capital criminal appeals—by granting discretionary review. *Boerckel*'s

reference to *Sandon*, suggesting that the Arizona Supreme Court does not "wish" to exercise that jurisdiction, is patently wrong.

Under the broad rule articulated in *Boerckel* and *Jennison*, Swoopes was required to seek discretionary review in the Arizona Supreme Court because it was an available state remedy—a feature of ordinary appellate procedure. Swoopes did, in fact, petition for discretionary review after his direct appeal, demonstrating the remedy's availability, but he did not do so with respect to all his habeas claims. This Court correctly held, in denying Swoopes' appeal, that he had defaulted all but his due process claim concerning the identification testimony. *Boerckel*, like *Jennison*, supports this Court's findings of procedural preclusion.[2]

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2. Swoopes committed additional procedural defaults, of course, in the district court, on those same defaulted claims, as this Court correctly held in its now-vacated memorandum opinion. He waived the cause and prejudice issues altogether by failing to offer the district court any explanation for his procedural defaults. *Swoopes v. Sublett*, No. 94-16033 at 2-3 (mem. decision, May 8, 1998). Swoopes also waived the *Harmon v. Ryan* presumption of informed confusion by failing to allege it or any other explanation for his procedural defaults when specifically admonished to do so by the federal district court.

II

BECAUSE PETITIONS FOR DISCRETIONARY ARIZONA SUPREME COURT REVIEW OF THE ARIZONA COURT OF APPEALS' DISPOSITION OF CRIMINAL APPEALS AND OF PETITIONS FOR POST-CONVICTION RELIEF ARE "PART OF THE ORDINARY APPELLATE REVIEW PROCEDURE IN THE STATE," THIS COURT MUST MAKE CLEAR THAT ARIZONA STATE PRISONERS WHO WISH TO EXHAUST CLAIMS PRESENTED TO THE ARIZONA COURT OF APPEALS MUST SEEK DISCRETIONARY REVIEW BY THE ARIZONA SUPREME COURT BEFORE RAISING THOSE CLAIMS IN A PETITION FOR WRIT OF FEDERAL HABEAS CORPUS.

Merely to answer the narrow "*Boerckel*" question of the historical availability of discretionary review with respect to Swoopes is not sufficient under the circumstances. While this Court must resolve the issues with regard to Swoopes in particular, this Court should also make clear that, despite any suggestion to the contrary in *Boerckel*, state prisoners today must petition for discretionary review in the Arizona Supreme Court in order to exhaust claims that were presented to the Arizona Court of Appeals, and that they must include in the petition for review all such claims that they wish to preserve for federal habeas corpus review.

This Court, in response to the United States Supreme Court's remand, should decisively refute *Boerckel*'s dictum on *Sandon* because *Boerckel* is utterly wrong about Arizona law and threatens to engender massive confusion in this Circuit concerning what state prisoners must do to exhaust state remedies in Arizona. Such correction of the *Boerckel* Court's dictum about Arizona law is not only permissible but probably would be welcomed by that Court. The Court has

decisively rejected any notion that habeas petitioners have any enforceable interest in courts making errors in their favor. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838 (1993). Moreover, the Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." *McMillian v. Monroe County, Alabama*, ___ U.S. ___, 117 S. Ct. 1734, 1737 (1977), quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 484 n.13, 106 S. Ct. 1292, 1301 n.13 (1986). Indeed, the United States Supreme Court "has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred *even if an examination of the state-law issue without such guidance might have justified a different conclusion.*" *Bishop v. Wood*, 426 U.S. 341, 346, 96 S. Ct. 2074, 2078 (1976) (emphasis added).

The *Boerckel* opinion cites *Sandon* for the patently erroneous proposition that the Arizona Supreme Court "do[es] not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." 119 S. Ct. at 1734. *Sandon* says nothing of the sort, nor is that true. It is crucial that this Court clear up as soon as possible the potential confusion created by *Boerckel*.

A. WHAT WAS THE ARIZONA SUPREME COURT'S HOLDING IN *SANDON*?

State prisoner Mark Sandon, like many whose criminal convictions are affirmed on direct appeal in the intermediate Arizona Court of Appeals, filed through counsel a petition for discretionary review of the Court of Appeals' decision. 161 Ariz. at 157, 777 P.2d at 220. The Arizona Supreme Court

APPENDIX B.1

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BY:

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED AUG 02 1999
GLENN D. CLARK, CLERK
By

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Respondent, v. SCOTT ALAN STEPHENS, Petitioner.	1 CA-CR 97-0458-PR DEPARTMENT D MARICOPA County Superior Court No. CR 87-01066 O R D E R

The court has considered respondent's motion for reconsideration of this court's order dated June 25, 1999. Relying on *O'Sullivan v. Boerckel*, ____ U.S. ____, 119 S. Ct. 1728 (1999), this court entered an order denying petitioner's motion to file a delayed petition for review to the Arizona Supreme Court as unnecessary. Respondent has filed a motion for reconsideration and pointed out that certain language in the *O'Sullivan* opinion may be misleading. Since *Jennison v. Goldsmith*, 940 F.2d 1308 (9th Cir. 1991), the law has been that a defendant must exhaust all state court remedies, including discretionary review by the Arizona Supreme Court, to avoid a procedural bar to federal habeas proceedings. While the Arizona Supreme Court may accept *Boerckel's*, invitation to declare its discretionary review procedure as outside the standard review process, it has not yet done so. For these reasons and the reasons stated in the motion for reconsideration,

IT IS ORDERED granting the motion for reconsideration and vacating this court's order dated June 25, 1999.

IT IS FURTHER ORDERED granting petitioner's motion to file a delayed petition for review to the Arizona Supreme Court. Any petition shall be filed on or before September 10, 1999.

DATED this 2nd day of August, 1999.

RUDOLPH J. GERBER
PRESIDING JUDGE

1 CA-CR 97-0458 PR

August 2, 1999

MARICOPA COUNTY
SUPERIOR COURT
CR 87-01066

A true copy of the foregoing
order was mailed
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Honorable John Foreman, Judge
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Glen D. Clark , Clerk
By

Deputy Clerk

APPENDIX B.2

RECEIVED
AUG 5 1999
BY:

ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, RESPONDENT, -vs- SCOTT ALAN STEPHENS, PETITIONER.	1 CA-CR 97-0458-PR MARICOPA COUNTY SUPERIOR COURT No. CR-87-01066 MOTION FOR PUBLICATION

Pursuant to Rule 111(A)(3) and (b)(1) and (b)(4) the Rules of the Arizona Supreme Court, the State of Arizona respectfully requests publication of this Court's Order, filed August 2, 1999, granting reconsideration and explaining that Arizona prisoners must seek discretionary Arizona Supreme Court review in order to avoid a procedural bar to federal habeas proceedings.

Not only does the Order merit publication pursuant to Rule 111 (b)(1) because it clarifies state law on an issue of first impression that arose upon the issuance of *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999); the Order also addresses a matter of substantial importance to judges and litigants alike—what, in light of *Boerckel*, state prisoners in Arizona must do to preserve claims for federal habeas review. Rule 111(b)(4), R. Sup. Ct. Although state courts have no jurisdiction to announce federal exhaustion requirements, the Order succinctly and unequivocally clears up the potential confusion, created by dictum in *Boerckel*, about *Arizona* law, by stating that the Arizona Supreme Court "may accept *Boerckel*'s invitation to declare its discretionary review procedure as as outside the standard review process [but] has not yet done so."

If published, this Court's Order would put an end to the ambiguity created by the erroneous *Boerckel* dictum on Arizona law and would provide the State of Arizona with concrete authority with

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which to rebut the inevitable future "*Boerckel*" claims of confusion about Arizona's appellate procedures. For these reasons, Respondents respectfully request publication.

DATED this 4th day of August, 1999.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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951125d1.mpb

APPENDIX B.3

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED FEB 14 2000
GLEN D. CLARK, CLERK
By

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Respondent, v. SCOTT ALAN STEPHENS, Petitioner.	1 CA-CR 97-0458-PR DEPARTMENT A MARICOPA County Superior Court No. CR 87-01066 O R D E R

The court has considered respondent's motion for publication.

IT IS ORDERED denying the motion.

DATED this 14th day of February, 2000.

RUDOLPH J. GERBER
PRESIDING JUDGE

MARICOPA COUNTY
SUPERIOR COURT
CR 87-01066

A true copy of the foregoing
order was mailed
February 14, 2000 to:

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Mr. Michael K. Jeanes, Clerk
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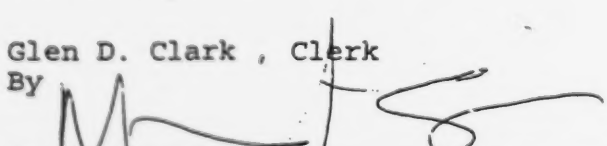
Phoenix, AZ 85003

Glen D. Clark , Clerk
By



Deputy Clerk

APPENDIX B.4

RECEIVED
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BY:

ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA,

RESPONDENT,

-vs-

SCOTT ALAN STEPHENS,

PETITIONER.

1 CA-CR 97-0458-PR

MARICOPA COUNTY
SUPERIOR COURT
No. CR-87-01066

MOTION FOR RECONSIDERATION

Pursuant to Rule 31.18 of the Arizona Rules of Criminal Procedure, and at the request of the Maricopa County Attorney, the State of Arizona moves for reconsideration of this Court's Order, filed June 25, 1999, denying Petitioner Stephens permission to file a delayed petition for review by the Arizona Supreme Court. This Motion for Reconsideration is supported by the attached Memorandum of Points and Authorities.

DATED this 9th day of July, 1999.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

MEMORANDUM OF POINTS AND AUTHORITIES

A. FACTUAL BACKGROUND.

Relying on the United States Supreme Court's recent decision in *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999), Petitioner Stephens asked this Court for permission to file a delayed petition for discretionary review so that he could present federal constitutional claims to the Arizona Supreme Court before advancing those claims in a federal habeas corpus petition. This Court, also relying on *Boerckel* and citing *State v. Sandon*, 161 Ariz. 157, 158, 777 P.2d 220, 221 (1989), denied Stephens' motion as "unnecessary," asserting that "Arizona has made it clear that 'once the defendant has been given the appeal to which he has a right, state remedies have been exhausted.'" (Order, dated June 25, 1999.)

B. SUMMARY OF THE ARGUMENT.

This Court erred as a matter of law in denying Stephens' motion on the ground that it was "unnecessary." For reasons explained fully below, this Court's statement about what is required to exhaust state remedies for purposes of federal habeas corpus was not only erroneous but without jurisdiction. *Jennison v. Goldsmith*, 940 F.2d 1308, 1310-11 and n.4 (9th Cir. 1991) (state courts lack authority to define federal exhaustion requirements); *Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992) ("the exhaustion requirements of 28 U.S.C. § 2254 are a matter of federal law").

Stephens' reliance on *Boerckel* was correct, and this Court's reliance on *Sandon* was misplaced, because discretionary review by the Arizona Supreme Court is "part of the ordinary appellate review procedure in the State." 119 S. Ct. at 1733. When discretionary review by a state's highest court fits that description, *Boerckel* "requir[es] state prisoners to file petitions for discretionary review" in order to preserve any claims they wish to present for federal habeas corpus review. *Id.* The question under *Boerckel* is simply whether discretionary review by the state's highest court is available as a part of the state's ordinary appellate review procedure. *Id.* If it is, state prisoners must seek discretionary review of any claims they wish to preserve for federal habeas proceedings. *Id.* In Arizona, a timely petition for discretionary review is an option available to "any party" under Rule 31.19(a), Arizona Rules of Criminal Procedure, a rule promulgated by the Arizona Supreme Court.

The confusion created by erroneous dictum in *Boerckel* concerning *State v. Sandon* is understandable, but this Court must refrain from perpetuating the error. For all the reasons fully

explained below, this Court should grant reconsideration, vacate the Order filed on June 25, 1999, and dispose of Stephens' motion on its merits.

C. ARGUMENT.

O'Sullivan v. Boerckel, 119 S. Ct. 1728 (1999), announced the following rule: to exhaust state remedies for federal habeas purposes, "state prisoners [must] file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." 119 S. Ct. at 1733. The rule applies to all prospective § 2254 habeas litigants except in those states where discretionary review is unavailable. *Id.*

Because discretionary review is available in Arizona, state prisoners here must seek it in order to preserve claims for federal habeas litigation. *Jennison v. Goldsmith*, 940 F2d at 1310-11 and n.4 ("Although review under Rule 31.19 [Ariz. R. Crim. P.] is discretionary, it is nevertheless a state remedy that remains available"). The Ninth Circuit announced the *Jennison* rule almost a decade ago. The *Jennison* rule has been in effect in the District of Arizona ever since, and *Boerckel*'s majority holding merely reiterates it with respect to all federal circuits. *See Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992) (petition for discretionary review in Arizona Supreme Court is prerequisite to federal habeas review); *Coley v. Gonzales*, 55 F.3d 1385, 1388 (9th Cir. 1995) (same).

Dictum in the *Boerckel* opinion, however, erroneously cites *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989), as an example of a state court that "do[es] not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." 119 S. Ct. at 1734. According to that dictum, *Sandon* means that petitions for discretionary review by the Arizona Supreme Court are "unwelcome," at minimum, or that the remedy might even be "unavailable," if the Arizona Supreme Court has declared it so. *Id.* Apparently, that misperception of the meaning of *Sandon* is what motivated this Court to declare Petitioner Stephens' request "unnecessary."

Boerckel's reference to *Sandon* is merely dictum because the *Boerckel* decision turned on Illinois procedural law, not Arizona law, and *Boerckel* held only, as the Ninth Circuit did in *Jennison*, that state prisoners must seek discretionary review if it is available as part of ordinary appellate procedures. 119 S. Ct. at 1734. While speculating that discretionary review might be unavailable or at least "discouraged" in Arizona, the *Boerckel* Court did not actually decide that question—properly so, because

APPENDIX C

ARIZONA SUPREME COURT

GILBERT ARVIZO MORENO,
PETITIONER-APPELLANT,

-VS-

DAVE GONZALEZ, Deputy Warden;
GRANT WOODS, Attorney General,
RESPONDENTS-APPELLEES.

SUPREME COURT
NO. CV-97-0268-CQ

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 95-15063

UNITED STATES DISTRICT COURT
NO. CV-93-00081-JET

DOUB BINFORD,
PETITIONER-APPELLANT,

-VS-

WILLIAM RHODE; GRANT
WOODS, Attorney General,
RESPONDENTS-APPELLEES.

SUPREME COURT
NO. CV-97-0271-CQ

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 96-15189

UNITED STATES DISTRICT COURT
NO. CV-95-01357-EHC

RESPONDENTS-APPELLEES' ANSWERING BRIEF

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ATTORNEYS FOR RESPONDENTS-APPELLEES

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1. A State may exclude the presentation of constitutional claims if the rule that precludes such consideration is "firmly established and regularly followed." 8

2. The statutory provisions of Article 29 of Title 13 control the outcome of the two questions presented. 10

3. Petitioners may not raise their claims pursuant to A.R.S. § 13–4231(6) or Rule 32.1(f), by alleging that their failure to file a timely petition for review or Rule 32 petition was without fault on their part. 14

4. A.R.S. § 13–4232(B) is a mandatory rule of state law prohibiting defendants from raising their present claims. 20

5. The policy considerations for imposing mandatory state rules of preclusion counsel this Court to strictly enforce the state's procedural rules. 20

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4. ***A.R.S. § 13-4232(B) is a mandatory rule of state law prohibiting defendants from raising their present claims.***

The second question presented is whether there exists a mandatory rule of state law that would bar the defendants from raising their claims at this date. A.R.S. § 13-4232(B) provides in pertinent part:

> If a claim under § 13-4231, paragraph 4, 5, 6 or 7 is to be raised in a successive or untimely petition, the notice shall set forth the substance of the claim and the reasons for not raising the claim in the previous petition or in a timely manner. If the notice does not state meritorious reasons substantiating the claim and why the claim was not stated in the previous petition or in a timely manner, the proceeding shall be summarily dismissed.

If either defendant attempted to raise their issues today, they would have to do so by an untimely or successive petition. The Ninth Circuit opinions recognize that the claims do not fit within paragraphs 4, 5, or 7. Therefore, unless defendants fit within paragraph 6, there is no available procedure for these defendants to litigate their claims. For the reasons discussed above, the defendants do not fit within paragraph 6, and their petitions now would be summarily dismissed.

5. ***The policy considerations for imposing mandatory state rules of preclusion counsel this Court to strictly enforce the state's procedural rules.***

The policy ramifications for enforcing the state's procedural rules are illustrated in this Court's opinion of *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989). In *Sandon*, this Court addressed a question similar to the one it faces in this case. Before *Sandon* was decided, this Court was inundated with motions requesting the filing of delayed petitions for review. Federal law mandates that every issue presented in a federal habeas petition must be fairly presented to the state's highest court. *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1065 (1989). The fact that this Court has discretionary review does not alleviate a state prisoner from at least attempting to present the claim to the Court in the

appropriate manner. *Id.* Based on this requirement, if a defendant has failed to present a claim to the state's highest court, he must return to state court and present the claim in the appropriate manner. Because there was no opinion from this Court stating that it would not accept motions for delayed petitions for review, defendant's were required to present the Court with such a motion, this Court would then deny the motion, and the defendant would return to federal court. This Court became tired of the practice, and stated in *Sandon* that they would no longer accept such motions. *Id.*, 161 Ariz. at 158, 777 P.2d at 221 (claims not properly raised from the court of appeals "are no longer open to substantive review in this Court, or in any other court in Arizona"). Once the mandatory language was in place, this Court was no longer deluged with such motions.

If this Court rules that defendants may file delayed petitions for review of post-conviction relief petitions under *Pope*, it does not matter how circumscribed this Court would attempt to limit the right, it would mean that all defendants would then have to attempt to do so in order to exhaust their state remedies. Also, it would not matter if the trial court granted or denied the request, because then the defendant would have to seek review of the decision all the way to this Court. In essence it would be *Sandon* revisited.[7] The same, or worse, can be said of filing delayed petitions for post-conviction relief. Every defendant would attempt to circumvent the rules by claiming he was not at fault, and each case would have to ultimately be reviewed by this Court. A better result is to hold that the rules are mandatory, which will mean that the federal courts will decide the cases without

7. According to the Federal District Court's Clerk's Office, there were 261 state habeas cases in 1996. So far in 1997, there have been 267 filings. While not all of these cases would have to be sent back, many would if there is no mandatory state law prohibiting their litigation.

returning them to state court, a result that is preferable to the victims of crime, and the Arizona criminal justice system.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents-Appellees respectfully request that this Court hold that the inmates have no further remedies in Arizona.

Respectfully submitted.

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

ATTORNEYS FOR RESPONDENTS-APPELLEES

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-15189

DOUB BINFORD,

PETITIONER-APPELLANT,

-vs-

WILLIAM RHODE; GRANT WOODS,
Attorney General,

RESPONDENTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
No. CIV-95-01357-EHC

RESPONDENTS-APPELLEES' SUPPLEMENTAL ANSWERING BRIEF

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over the petition for writ of habeas corpus under 28 U.S.C. § 2254. On January 3, 1996, the district court entered its order denying the petition, which was a final order under Rules 54(a) and 58 of the Federal Rules of Civil Procedure. On January 19, 1996, Petitioner filed a notice of appeal that was timely under Rule 4(a) of the Federal Rules of Appellate Procedure. On January 26, 1996, the district court granted a certificate of appealability. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253.

QUESTION PRESENTED FOR REVIEW

1. Did the Arizona Court of Appeals' fundamental review of the record in Petitioner's direct appeal constitute a review on the merits of Petitioner's "unintelligent plea" claim and his ineffective assistance of counsel claim, and thereby, excuse Petitioner's procedural default?

2. Did the district court err in finding that Petitioner did not exhaust his claims in his direct appeal from his 1993 resentencing?

3. Did the district court err in finding that Petitioner's state habeas petition to the Arizona Supreme Court did not serve to exhaust his claims of error?

STATEMENT OF THE CASE

For purposes of this supplemental brief, Respondents will not repeat the statement of the case previously presented in its original answering brief. Respondents will, however, supplement the original statement of the case with the procedural history of the case since briefing was completed in this matter, and when necessary to assist this Court, will provide pertinent facts in each argument.

On June 19, 1997, following briefing on Petitioner's direct appeal, this Court issued an order certifying the following questions to the Supreme Court of Arizona:

1. May Binford raise his ineffective assistance of trial counsel and unintelligent plea claims by alleging, pursuant to Rule 32.1(f), that the failure to file a timely petition for review was without fault on his part?

2. Does any mandatory rule of state law bar Binford from raising his ineffective assistance of trial counsel and unintelligent plea claims at this date?

Because these questions mirrored those certified to the Arizona Supreme Court by this Court in *Moreno v. Gonzales*, No. 95-15063, the Arizona Supreme Court consolidated both matters and accepted the questions posed. On July 17, 1998, the Arizona Supreme Court issued its opinion addressing the questions presented as follows:

Question One:

Under Rule 32.1(f), the term "appeal" means direct appeal under Rule 31 of the Arizona Rules of Criminal Procedure, and thus, a petition for review to the Arizona Supreme Court following direct appeal, and a petition for review following denial of post-conviction relief in the trial court, are not "appeals" within the meaning of Rule 32.1(f) of the Arizona Rules of Criminal Procedure. As a result, the Arizona Supreme Court held that Petitioner may not, under Rule 32.1(f), file a delayed petition for review raising his ineffective assistance of trial counsel and unintelligent plea claims to the state appellate courts.

Question Two:

Due to the broad nature of this certified question, whether *any* mandatory rule of state law bars Petitioner's claim, the Arizona Supreme Court chose not to answer this question categorically, but to share insight into the rules that govern Arizona's post-conviction relief remedies. Noting the 1992 amendments to Rule 32 of the Arizona Rules of Criminal Procedure which require that in noncapital cases the notice of post-conviction relief be filed within 90 days of the entry of judgment and sentence or within 30 days of the order and mandate affirming the judgment and sentence on direct appeal, whichever is later, and noting that the only exception to these time limits, 171 Ariz. XLIV (1992), is inapplicable to Petitioner, the Court held that Petitioner cannot now file a first *petition for post-conviction relief.*

Moreno v. Gonzalez, ___ Ariz. ____, ____, 962 P.2d 205, 208–09 (1998). Petitioner moved the Arizona Supreme Court to reconsider its decision, which the Arizona Supreme Court denied. (Petitioner's Excerpt 31.) The Arizona Supreme Court issued its mandate on October 7, 1998. (Petitioner's Excerpt 32.)

On August 3, 1998, this Court ordered supplemental briefing as follows:

> The parties shall address, inter alia, *Binford v. Rhode*, No. CV-97-0271-CQ (Ariz. July, 1998) and *Ortiz v. Stewart*, 1998 WL 349467 at 4-5 (9th Cir. July 1, 1998).

On November 9, 1998, Petitioner served Respondents with a copy of their supplemental opening brief pursuant to that order.

SUMMARY OF ARGUMENT

The Arizona Court of Appeals' fundamental error review of Petitioner's direct appeal, filed pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), did not serve to preserve Petitioner's claims for federal review. Nor did Petitioner's attempt to bootstrap his post-conviction relief claims to his direct appeal following resentencing exhaust his claims. The Arizona Court of Appeals clearly stated that it would not address the claims, noting that the only issue properly before it was the validity of the sentence imposed on Count II following resentencing.

Petitioner's futile attempt to present his abandoned post-conviction claims to the Arizona Supreme Court in a state habeas corpus proceeding also failed.

Finally, the Arizona Supreme Court's recent ruling finding that Petitioner can not file a delayed petition for review from his first post-conviction relief proceedings under Rule 32.1(f) of the Arizona Rules of Criminal Procedure, and its holding that Petitioner can not file a "first" petition for post-conviction relief under Rule 32, precludes Petitioner from now trying to present his claims to the State's highest court in a procedurally appropriate manner. As a result, the district court did not err in finding that Petitioner had procedurally defaulted on his

ns, and that his failure to show cause and prejudice required dismissal of his ion.

ARGUMENT

I

AS THIS COURT HAS PREVIOUSLY HELD, FUNDAMENTAL ERROR REVIEW BY THE ARIZONA COURT OF APPEALS ON DIRECT APPEAL DOES NOT PRESERVE ANY CLAIMS FOR PURPOSES OF FEDERAL REVIEW.

Petitioner contends that, by virtue of his 1989 direct appeal, the Arizona rt of Appeals necessarily reviewed the merits of his claims that his plea was ntelligently entered and that trial counsel was ineffective. Petitioner further es that, because his direct appeal took place during the window of opportunity ded by *Harmon v. Ryan*, 959 F.2d 1457 (9th Cir. 1992),[1] he was not required esent these claims to the Arizona Supreme Court, and thus, has exhausted his is for federal review. Although Petitioner's direct appeal admittedly fell within *Harmon* window, his claim must fail because the Arizona appellate court's w of the record for fundamental error, contrary to Petitioner's contention, did esult in his current claims being "fairly presented" to the state appellate court.

989 APPEAL.

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1. *See Jennison* v. *Goldsmith*, 940 F.2d 1308, 1311 (1991); *Thomas v. ldsmith*, 979 F.2d 746, 750 (9th Cir. 1992).

After entering his change of plea and being sentenced to prison, Petitioner filed a timely notice of appeal. Appointed counsel, in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), filed an opening brief stating that he had reviewed the record and found no arguable issues. (Respondents' Excerpt A.) Although the Arizona Court of Appeals gave Petitioner an opportunity to file a supplemental brief, he did not. (Petitioner's Excerpt 14.) On February 21, 1989, the Arizona Court of Appeals issued its memorandum decision affirming Petitioner's conviction. (*Id.*) Contrary to Petitioner's contention, although the Arizona Court of Appeals noted that the *trial court* had found Petitioner's plea "was made knowingly, intelligently, and voluntarily; was not the result of force, threats, or promises; and was factually supported," the appellate court made no such independent finding. (*Id.* at 3.) Instead, the court merely held that, "pursuant to A.R.S. § 13–4035, [it had] fully reviewed the record and [found] the appeal to be without merit." (*Id.*) The court also advised appellate counsel of his duty to inform Petitioner of the status of his appeal and Petitioner's future options, including the option of filing a pro per motion for reconsideration or petition for review. (*Id.*) The case became final on March 28, 1989, when the court of appeals issued its

mandate following Petitioner's failure to file either a motion for reconsideration or a petition for review. (Respondents' Excerpt B.)

B. THE ARIZONA COURT OF APPEALS, BY VIRTUE OF ITS FUNDAMENTAL ERROR REVIEW, DID NOT ADDRESS THE MERITS OF PETITIONER'S CLAIMS.

Although a Petitioner's failure to take his direct appeal to the state's highest court may have been excused under this Court's opinion in *Harmon v. Ryan,* because Petitioner did not raise any claims in his direct appeal, he cannot be said to have exhausted his state remedies with respect to any of his current claims of error.

The Arizona Court of Appeals review for fundamental error in no way constitutes review on the merits of all claims Petitioner could have presented but chose not to. This Court, the First, Eighth, and Eleventh Circuit Court of Appeals, have rejected the claim that an appellate court's generalized review of an appellate record for error constitutes "implicit consideration" of all claims not raised and that such a review is sufficient to satisfy the fair presentation requirement. *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1996); *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir. 1988); *Puleio v. Vose*, 830 F.2d 1197, 1200 (1st Cir. 1987); *Hayes v. Lockhart*, 766 F.2d 1247, 1252 (8th Cir. 1985). This Court has specifically held that the duty of the Arizona appellate courts to review the record in a case for "fundamental error," a duty imposed by a now-repealed statute, does

APPENDIX E

No. 96-15189

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUB BINFORD,

Petitioner-Appellant

v.

WILLIAM RHODE; GRANT WOODS,
Attorney General,

Respondents-Appellees

SUPPLEMENTAL REPLY BRIEF OF PETITIONER/APPELLANT

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I. RESPONDENTS CONCEDE THAT ISSUES CONSIDERED BY THE ARIZONA COURT OF APPEALS IN PETITIONER'S DIRECT APPEAL ARE EXHAUSTED.

Respondents concede that the claims considered and rejected by the Arizona Court of Appeals in Petitioner's 1988 direct appeal from his guilty plea and sentence are exhausted. Supp.Ans.Brf. at 5, 7. Respondents argue, however, that although the Arizona Court of Appeals issued a decision and affirmed Petitioner's guilty plea conviction and sentence, the appellate did not consider any claims.[1] Id. at 8. The facts and law show otherwise.

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[1]Later, however, Respondents admit that the appellate court did consider and reject Petitioner's claims of ineffective counsel and unintelligent plea in the 1988 appeal: "[F]inding that the claims Petitioner raised in his supplemental brief had been argued and disposed of in petitioner's 1988 appeal, and in Petitioner's postconviction relief proceedings, the Arizona Court of Appeals refused to address Petitioner's supplemental claims of error." Supp.Ans.Brf. at 11 (emphasis added). Obviously these claims could not have been "argued and disposed of" in the 1988 appeal without the appellate court reviewing and rejecting them.

In its decision affirming Petitioner's guilty plea conviction and sentence, the Court of Appeals specifically discussed the facts surrounding the guilty plea Petitioner entered and his motion to withdraw it. It stated that shortly after entering the plea, Petitioner "moved to withdraw" it because "he did not understand the terms, conditions and consequences," and that "the trial court denied the motion." ER 14 at 1. The appellate court stated that the trial "court determined that [Petitioner's] change of plea was made knowingly, intelligently, and voluntarily" and "was not the result of force, threats, or promises; and was factually supported." Id. at 3.

The appellate court then explained that "pursuant to A.R.S. § 13-4035," it had "fully reviewed the record" and found "the appeal to be without merit." It then "affirmed" the "judgment of conviction and the sentence imposed." Id. at 4.

This review necessarily included the claims

Petitioner raised below that his guilty plea was unintelligent and his counsel ineffective because "he did not understand the terms, conditions and consequences of his plea." ER 14 at 1. The appellate court's duties under A.R.S. § 13-4035, and Anders v. California, 386 U.S. 738 (1967),[2] required the court to conduct "[a]n exhaustive search of the record" for fundamental and "prejudicial error." State v. Leon, 104 Ariz. 297, 300, 451 P.2d 878, 881 (1969); see also State v. Lopez, 153 Ariz. 285, 736 P.2d 369 (1987). As the Arizona courts have explained, the "scope of review" in "a criminal defendant's appeal from either a conviction or sentence" "necessarily includes a review of the validity of the conviction," State v. Smith, 171 Ariz. 501, 504, 831 P.2d 877, 880 (App. 1992), and "the entire record" "regardless of the grounds urged in that

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[2]Counsel appointed by the court to represent Petitioner in his direct appeal from his guilty plea and sentence filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967).

appeal." State v. Dawson, 164 Ariz. 278, 283, 792 P.2d 741, 746 (1990). The appellate court "will search the record and correct 'fundamental error'... even if not raised in the trial court or on appeal." Id. (citations omitted). See also State v. Mauro, 159 Ariz. 186, 193, 766 P.2d 59, 66 (1988)(Arizona appellate courts have "a duty to search the record for fundamental error whether a defendant specifies exactly where it is located or not.").

When a conviction results from the entry of a guilty plea, the appellate court necessarily reviews whether the plea was constitutional, including whether it was entered knowingly, intelligently and voluntarily. For example, in State v Robinson, 24 Ariz. App. 372, 539 P.2d 176 (App. 1975), appellate counsel filed an Anders brief in the consolidated appeal of the defendant's three guilty plea convictions. Although counsel raised no issues as to the pleas the defendant entered, the appellate court

nonetheless reviewed the record to determine the constitutionality of the pleas. After that review, it concluded that the guilty plea entered in one case was unconstitutional, but that the pleas in the other two cases were "knowingly, intelligently and voluntarily entered." Id., 24 Ariz.App. at 373-374, 539 P.2d at 177-178. See also State v. Cuffle, 171 Ariz. 49, 50, 828 P.2d 773, 774 (1992)(counsel filed Anders brief on appeal; court remanded for hearing "to determine if, at the time of the pleas of no contest, the defendant knew, or was advised by counsel before the pleas, of the nature of the offenses to which he was pleading no contest"); State v. Barnes, 167 Ariz. 186, 805 P.2d 1007 (1991)(counsel filed Anders brief in court of appeals; "[u]pon reviewing the record, the court [of appeals] concluded that... [trial court] had failed to inform her of the rights she waived...."[3]; State v.

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[3]The Arizona Supreme Court, however, disagreed with the lower appellate court's conclusion concerning the

Lopez, 153 Ariz. at 286, 736 P.2d at 370 (although no issue raised as to constitutionality of plea, appellate court "pursuant to A.R.S. § 13-4035 and Anders v. California, [citation omitted], reviewed the entire record in this case" and concluded that the "facts and circumstances justified the acceptance of the plea of guilty" and the "record also reflects that the defendant knowingly, voluntarily and intelligently entered into the plea agreement ...."); State v. Thomas, 165 Ariz. 573, 574, 799 P.2d 914, 915 (App. 1990)(counsel filed Anders brief; court "searched record for fundamental error" and "found none"; "change of plea and sentencing hearings" were proper); State v. Nevell 165 Ariz. 362, 364, 798 P.2d 1371, 1373 (App. 1990)(counsel filed Anders brief; court determined trial court erred in sentencing defendant

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validity of the defendant's plea, and affirmed the defendant's conviction and sentence. Id., 167 Ariz. At 191, 805 P.2d at 1011.

pursuant to plea agreement); State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973)("Although not raised by appellant, in searching the record for fundamental error in compliance with A.R.S. § 13-1715, subsec. B,[4] we have found that the record does not affirmatively show that defendant was aware of one of the consequences of his plea...."); State v. Willard, 102 Ariz. 271, 272, 428 P.2d 423, 424 (1967)("we have searched the entire record for fundamental error as required in §13-1715 A.R.S. The record discloses ... that defendant's plea of guilty was voluntarily given.")

In addition, the Arizona courts' review for fundamental error includes a search for ineffective assistance of counsel:

> Once a defendant files an appeal ..., we are expressly required by statute to review issues

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[4]This statute was renumbered in 1977 as § 13-4035, and repealed in 1995. Ariz.Laws 1995, Ch. 198, § 1; Ariz. Laws 1977, Ch. 142, § 161.

> affecting both judgment and sentencing in our search for fundamental error. See, e.g., State v. Smith, 136 Ariz. 273, 279, 665 P.2d 995, 1001 (1983)(finding of ineffective assistance of counsel at sentencing considered part of the court's "fundamental error" review).

State v. Brewer, 170 Ariz. 486, 493, 826 P.2d 783, 790 (1992)(emphasis added). See also State v. Noleen, 142 Ariz. 101, 104, 688 P.2d 993, 995 (1984)(pursuant to A.R.S. § 13-4035, court considers ineffective counsel claims based on "the entire record on appeal.") Based on Petitioner's allegations contained in the record before the appellate court, that petitioner did not understand the plea he entered, and his trial counsel's failure to provide additional detail to the court concerning this issue when asked to do so, ER 12 at p. 22, the appellate court's fundamental error review included this claim.

Thus, there is no question that the appellate court reviewed Petitioner's claims of ineffective counsel and unintelligent plea in the 1988 appeal. First, as we

have shown, the appellate court said it "fully reviewed the record." It specifically discussed the guilty plea and the fact that Petitioner attempted to withdraw from it because he did not understand it, but was not permitted to do so. After stating that the trial court determined the "change of plea was knowingly, intelligently, and voluntarily" made, the appellate court affirmed the conviction and sentence. ER 14 at 3.

Second, the appellate court later explained that it had reviewed and rejected Petitioner's claims of ineffective counsel and improper plea in his 1988 appeal. In its decision following Petitioner's resentencing and postconviction proceedings, the appellate court found:

> Both [ineffective assistance of counsel and improper plea agreement] issues have been argued, and disposed of, in Appellant's previous appeal and his petition for post-conviction relief.

ER 25 at 2-3. This statement is plain: the appellate

Petitioner has shown cause for his alleged defaults, and the resulting prejudice: he entered a plea of guilt which he did not understand. Alternatively, Petitioner asks this Court to remand this matter to the District Court for a hearing at which additional facts establishing cause and prejudice, and miscarriage of justice can be investigated and presented.

CONCLUSION

For all these reasons, Petitioner has fairly presented his claims to the state courts and the District Court's order should be reversed and the case remanded for review of them. Alternatively, because there is no mandatory bar preventing Petitioner from returning to state court, this Court should hold these proceedings in abeyance pending exhaustion of those

claims it finds were not fairly presented to the state courts.

Dated this 22nd day of December, 1998.

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